**IN THE MATTER OF THE MOTION FOR SUMMARY DISPOSITION**
**BETWEEN**

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School Service Employees Union, Local 284

Union

-and- BMS Case No.: 17-PA-0139

Independent School District No. 727, Big Lake, Minnesota

Employer

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ARBITRATOR: Christine D. Ver Ploeg

DATE OF DECISION: October 24, 2016

ADVOCATES

For the District
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For the Union
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## BACKGROUND

Independent School District No. 727, Big Lake, Minnesota (hereinafter "District") has brought a Motion for Summary Disposition of two (now consolidated) grievances brought by the School Service Employees Union, Local 284, (hereinafter "Union"). The District has brought this Motion pursuant to Minnesota Statutes Section 572B.15(b), a provision of the Minnesota Uniform Arbitration Act that governs all agreements to arbitrate entered into or after August 1, 2011. That provision grants arbitrators in Minnesota the authority to grant summary disposition of a claim prior to a full arbitration hearing on the matter.[1]

The Union's consolidated grievances allege that the District has violated the terms of the parties' collective-bargaining agreement by contracting out food service operations performed by Union members employed by the District. The District submits that a decision to subcontract food services is an inherent managerial right that is not substantively arbitrable. Moreover, not only is the decision to subcontract not subject to arbitration, the District contends that these grievances are not procedurally arbitrable as they are not ripe for determination or, if ripe, are untimely and therefore waived.

Briefly stated, these are the facts leading to the Union's grievances. In the fall of 2015 the District's longtime food services director notified the District that she intended to retire at the end of the 2015-2016 school year. At that time the Union apparently was seeking to merge the food services employees unit, which stood as its own separate bargaining unit, with two other units. The District had been opposing the Union's petitions to merge the units for over a year.

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[1] Minnesota Statutes Section I 72B .15 (B), provides:

(t)he arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and the other parties have a reasonable opportunity to respond.

However, in October 2015, it unexpectedly agreed to the merger. One month later the School Board met and directed District personnel to explore the possibility of contracting out the food services program. The Union cries foul, submitting that the District is now seeking to take advantage of its tactical about-face to support subcontracting out bargaining unit work.

The Union protested the District's decision to subcontract the food service work and, after receiving the District's March 4, 2016, communication that it would not bargain over that decision, it filed its first grievance on March 24, 2016. On April 28, 2016, the School Board formally approved what characterizes as its "conditional" subcontracting of food services, following which the Union filed this second grievance on March 26, 2016.

Although the parties' collective bargaining agreement expired on June 30, 2016, it remains in effect until the parties' negotiations reach impasse. The parties have been negotiating and mediating over the expiration and potential terms of a new contract. They met to negotiate June 2, June 27 and August 4, 2016, but were unable to reach agreement. Given that stalemate, the BMS appointed a mediator and the parties have so far participated in one mediation session, on September 27, 2016. Two more mediation sessions are scheduled for October 26 and November 17, 2016.

In the meantime, the District has entered into what it calls a "conditional" Food Services Management Contract with a vendor, Chartwells, to oversee food services for the 2016-2017 school year. In that contract, which took effect on July 1, 2016 and ends June 30, 2017, the District and Chartwells have agreed:

> Notwithstanding the effective date of the contract as set forth herein, the SFA food-service employees who are members of the School Services Employees Local 284 shall remain SFA employees until the date of termination of the collective bargaining agreement between the SFA and School Services Employees Local 284. The SFA shall provide the company

> with written notice of the termination of the collective bargaining agreement. The SFA and the company should work together to determine the appropriate transition of food services from SFA employees to Company employees.

The District submitted this Motion for Summary Disposition, with supporting Memorandum, on September 30, 2016, and the Union's Memorandum opposing that Motion was submitted on October 14, 2016. At the Union's request a tentative hearing date was scheduled in the event that the District's Motion is denied in its entirety. The parties requested, and this arbitrator agreed to provide, an expeditious decision on the District's Motion. In the meantime, the parties are scheduled for two more mediation sessions, as noted above.

## DECISION

The District, as the moving party, bears the burden of proving that undisputed evidence supports its claimed bases for summarily disposing of the Union's grievances. In considering whether the Motion for Summary Disposition should be granted, I note that notwithstanding the authority now granted to me pursuant to Minnesota Statutes Section 572B.15(b), doing so is contrary to the long-standing American labor relations tradition which contemplates a formal evidentiary hearing, with testimony and the right to cross-examine, on all but the most clear-cut matters.

I have balanced both considerations in evaluating the evidence and argument regarding the District's Motion to determine if there are, indeed, no genuine issues regarding law or relevant facts. The arguments upon which the District challenges both the substantive and the procedural arbitrability of these grievances are:

(1) a decision to subcontract food services is an inherent managerial right that is not substantively arbitrable;

(2) these grievances are not ripe for determination or,

(3) if ripe, are untimely and, therefore, waived.

The following analyses, although brief, are the result of careful examination of the parties' extensive briefs and case citations on the issues raised. The analysis regarding the substantive arbitrability of these grievances is preliminary, subject to further evidence and argument if that becomes necessary. Thus, the District's Motion is not now granted on this basis. Nor is its Motion granted on the basis of untimeliness as it cannot be said that the Union's grievances are unquestionably untimely. However, as explained below, I am persuaded that this matter is not yet ripe for arbitral determination.

### *1. Is the decision to subcontract food services an inherent managerial right that is not substantively arbitrable?*

The District submits that these grievances are not substantively arbitrable as it is well-established that the ***decision*** to subcontract is, absent express contract provisions to the contrary, an inherent management right. The District acknowledges its obligation to bargain the ***effects*** of subcontracting, and it is apparent that it has always stood ready to negotiate that mandatory subject of bargaining. By contrast, the Union submits that the issue is not so clear-cut. I agree.

In a case involving this Union, the Minnesota Supreme Court reaffirmed the long-standing presumption in favor of arbitrability in a similar case involving the contracting out of all food services bargaining unit work. *Matter of Arbitration Between Independent School District No. 88, New Ulm, Minnesota v. School Service Employees Union Local 284, 503 NW.2d 104 (1993).*

In determining that the facts in that case required a fact-based inquiry to review a unilateral subcontracting decision, the Court indicated that the District's ability to subcontract was not absolute. In *New Ulm* the Court determined that the arbitrator should evaluate all of the material facts and underlying evidence, including:

> (1) evidence regarding the District's good faith,
>
> (2) whether the subcontracting represented a reasonable business decision,
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> (3) whether the subcontracting resulted in the subversion of the labor agreement, and
>
> (4) whether the subcontracting had the effect of seriously weakening the bargaining unit or important parts of it.

I recognize that *New Ulm* differs from the present situation in that in *New Ulm* the District had, prior to impasse, fully implemented its decision to subcontract its food services and had terminated the employment of all of the employees in the bargaining unit. By contrast, these food-service workers, although working under the direction of Chartwells, remain District employees covered by the terms of the collective bargaining agreement. This will remain the case until agreement is reached or the parties' negotiations are formally declared to be at impasse.

Despite these differences, *New Ulm* recognizes that there can be many considerations relevant to the issue of subcontracting. In this case the Union has persuasively identified a number of questions which it urges can only be addressed in a full inquiry that includes live testimony subject to cross-examination. The Union's argument has been persuasive. Based on the evidence presented I cannot conclude that these grievances unquestionably lack substantive arbitrability

***2. Are these grievances untimely and therefore waived?***

The District submits that this matter is not procedurally arbitrable because the Union has not complied with Contract's requirement that a grievance must be "filed within twenty (20) days after the date of the first event giving rise to the grievance occurred." (Article X, Sec. 10.4). "Days" refer to all working days, which are defined as all weekdays not designated as holidays by state law. Art. X, Sec. 10.4

The parties disagree regarding the dates upon which the triggering events occurred. Based on the evidence now of record, it is reasonable to conclude that the following timeline has met the Contract's requirements:

March 4, 2016: District communicates to the Union that it will not bargain over its decision to subcontract

March 24, 2016: Union files first grievance

April 28, 2016: School Board formally approves the subcontracting of food services,

March 26, 2016: Union files second grievance

For these reasons, I find that the evidence presented fails to support unquestionably the District's claim of untimeliness.

***3. Are these grievances ripe for arbitral resolution?***

The District submits that these grievances are not procedurally arbitrable because the District has not yet implemented its decision to subcontract. It submits that the contract it has entered into with Chartwells is simply a "conditional" contract under which these Union

employees remain District employees until their collective-bargaining agreement terminates. As that has not happened, and as there has been no formal declaration that the parties' negotiations have reached an impasse, the District argues there is no justiciable controversy appropriate for the arbitrator to consider.

I agree that an arbitrator should not prematurely address abstract disagreements that remain solely in the realm of speculative possibility. In this case the parties are continuing to negotiate and mediate and have not reached impasse. No employee has yet suffered a concrete adverse consequence as a result of the District's actions. So far there have been no changes to bargaining unit members' terms and conditions of employment; only proposed changes. As such, I agree that absent a formal impasse, this grievance is not ripe for arbitration.

## SUMMARY

In summary, the District's Motion for Summary Disposition is granted based upon its argument that the Union's claims are not ripe for determination. The arbitration hearing currently scheduled in this matter shall be postponed, or canceled, depending upon the success or lack thereof of the parties' continued negotiations and mediation efforts.

October 24, 2016

Christine Ver Ploeg, Arbitrator